sense, without which genius is a misfortune; an instinctive accuracy of judgment, which always proportioned his efforts to the occasion. He was never guilty of the ridiculous and common error amongst young members, of attempting to force the subject beyond its nature—of swelling trifles with consequence, and working the ocean into tempest, "To waft a feather, or to drown a fly." He was always earnest and dignified—never captious. Mr. Wirt, we believe, possessed in a large degree the stern virtues, the moral worth, and the earnest, firm, and profound mind of Marshall.

In the several judicial and state offices to which Mr. Wirt was called, he fulfilled his duties with faithfulness and credit. He died in Washington, February 18th 1834.

It were well if the young and rising members of the American bar would study more earnestly and thoroughly the character and genius of such men; and we can but indulge the hope that the country and the profession may be abundantly favored in all coming time with lawyers of the stamp of WILLIAM WIRT.

J. F. B.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

JOHN G. HANSBROUGH ET AL. *v.* PHILIP F. W. PECK.

Where a vendor of real estate on default in the terms of payment by vendee, goes into a court of equity and has the contract declared void and of no effect, and is remitted to his original title and possession, this is not a proceeding in rescission, but in affirmance of the contract, and does not entitle the vendee to recover back the part of the purchase-money already paid.

A purchaser of real estate, who has paid part of his purchase-money or done an act in part performance of his agreement and then refuses to complete his contract, the vendor being willing to do his part, will not be permitted to recover back what has been thus advanced or done.

Where a parol promise is substantially the same as a previous written one, and nothing is done under the latter which the promissor was not already bound to do under the former, no new consideration passing between the parties, the existence or enforcement of the parol contract cannot be set up as a rescission of the former written one.

A purchaser after payment of part of the purchase-money, intended to abandon the contract, and the vendor promised, if he would pay up arrears, to indulge him

for a certain time. The purchaser paid up the arrears, but the vendor enforced his contract within the time (as alleged) that he promised to forbear. *Held*, that there was no consideration for the promise, the purchaser having done nothing he was not already bound to do by his original contract.

THIS was an appeal from a decree of the Circuit Court of the United States for the Northern District of Illinois.

The bill was filed in the court below by the plaintiffs to recover back moneys paid upon a contract, dated 28th January 1857, for the purchase by them of several lots of land in the city of Chicago; and, also, for the value of improvements made on the same, on the ground that the contract had been rescinded by the defendant.

The purchase-money amounted to $93,000, to be paid on the 29th April 1861, some four years and three months from date, together with semi-annual interest at the rate of 10 per cent. per annum. After erecting improvements on the premises of the value of $18,000, and paying the interest for two years, the plaintiffs becoming embarrassed, or dissatisfied with their contract, were desirous of surrendering it, but were persuaded by the defendant to remain, and paid the interest for another year, 1859. After that no further payments were made, and, on the 1st April 1861, the defendant filed a bill in chancery in the state court to prevent the removal of the buildings from the premises, and to get possession of the same, and, on the 23d August 1862, a decree was entered to this effect, and the defendant put into the possession.

The opinion of the court was delivered by

NELSON, J.—It will be seen from the statement of facts, that the plaintiffs were in default on account of the non-payment of the interest for more than a year, and also that the principal fell due a few days after the filing of the bill on account of this default in the payments. The contract was a very stringent one. Time was, in terms, made of the essence of it, in respect to the payments; and, further, in case of a default in any one payment, for thirty days, the agreement was to be null and void, and no longer binding, at the option of the vendor, and all payments that had been made were to be forfeited to him; and also in case of default in any of the payments it was agreed that the contract, at the election of the vendor, was to be at an end, and the purchasers deemed

to be in possession as tenants at will, liable for a rent equal to the amount of interest of the purchase-money.

The decree founded on this contract in the suit in chancery, and which is made a part of the bill in the case before us, and which suit was litigated between these parties, restrained the defendants, the purchasers, from removing the buildings from the premises, and declared them to be fixtures; and for the default in the payment of the purchase-money the plaintiff, the vendor, was put in possession, and all the tenants were required to attorn to him; and, further, it declared that he was entitled to the estate and interest in the lots, the same as before the contract, and to remove any doubt in the title by reason of the contract and the default in the payments, it declared that the premises shall be discharged from any encumbrance or charge in respect to the contract of sale; and that the purchasers, or any one claiming through them, be for ever debarred from having any estate, or interest, or right of possession in the premises, having lost the same by wilful default; and the articles of agreement are to be held in relation to the title and possession as of no effect and void, as it respects the vendor and all claiming under or through him.

Now, this is the decree that is relied on as having rescinded the contract at the instance of the defendant, by reason of which the plaintiffs have become entitled to recover back the purchase-money paid, together with the value of the improvements. The position is, that there is no longer a subsisting contract, as an end has been put to it by the vendor, and he has in consequence resumed the possession, and claims to hold the estate the same as if no contract had ever existed, and that in such case the purchaser, upon settled principles of law and equity, is at liberty to recover back the consideration paid and the value of the improvements. But the difficulty is, that the vendor has only availed himself of a provision of the contract, which entitled him to proceed in a court of chancery, by reason of the default of the purchaser in making his payments, to put an end to it and be restored to the possession. It is a proceeding in affirmance, not in rescission of it, by enforcing a remedy expressly reserved in it. Indeed, without such clause or reservation, the remedy would have been equally available to him. It is a right growing out of the default of the purchaser, as the law will not permit him both to withhold

the purchase-money and keep possession and enjoy the rents and profits of the estate; nor will it subject the vendor to the return of the purchase-money if he is obliged to go into a court of equity to be restored to the possession.

In case of a default in the payments, there are several remedies open to the vendor. He may sue on the contract and recover judgment for the purchase-money, and take out execution against the property of the defendant, and among other property, the lands sold; or he may bring ejectment, and recover back the possession, but in that case, the purchaser, by going into a court of equity within a reasonable time and offering payment of the purchase-money, together with costs, is entitled to a performance of the contract; or the vendor may go in the first instance into a court of equity, as in the present case, and call on the purchaser to come forward and pay the money due, or be for ever thereafter foreclosed from setting up any claim against the estate. In these contracts for the sale of real estate the vendor holds the legal title as a security for the payment of the purchase-money, and in case of a persistent default, his better remedy, and under some circumstances his only safe remedy, is to institute proceedings in the proper court to foreclose the equity of the purchaser where partial payments or valuable improvements have been made. The court will usually give the purchaser a day, if he desires it, longer or shorter, depending on the particular circumstances of the case, to raise the money and to perform his part of the agreement.

This mode of selling real estate in the United States is a very common and favorite one, and the principles governing the contract, both in law and equity, are more fully and perfectly settled than in England or any other country. The books of reports are full of cases arising out of it, and every phase of the litigation repeatedly considered and adjudged. And no rule in respect to the contract is better settled than this: That the party who has advanced money or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfil all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done: *Green* v. *Green*, 9 Cowen 46; 13 J. R. 364, SPENCER, J.; 6 Gray 412; 42 Barbour 58.

The same doctrine has been repeatedly applied by the courts of Illinois, the state in which this case arose: 21 Ill. R. 236, and other cases referred to in the argument.

This principle would of itself have defeated the plaintiffs in this suit, independently of the decree foreclosing their equity in the contract.

It appears in the case that the parties agreed upon the rate of 10 per cent. interest for the forbearance of the purchase-money unpaid, when at the time, as is admitted, the legal rate was only 6 per cent. But this law did not invalidate the contract. It authorized the party to recover of the party taking usury threefold the amount above the legal rate, at any time within two years after the right of action accrued. This bill was filed the 23d August 1862. The last payment of interest was made 31st January 1860. More than two years, therefore, had elapsed before the suit was brought.

We should add, it is not admitted by the defendant that this arrangement had the effect to make the contract usurious; and would not, according to the case of *Bute* v. *Bigood*, 7 B. & Cr. 453, if the excess of interest stipulated for was in fact a part of the purchase-money.

After the default of the purchasers, and when they were disposed to surrender the contract, the vendor proposed to them if they would abandon the idea, and pay up the taxes in arrears and interest that had accrued, he would indulge them, and to that end, and until a revival of business in Chicago, he would be satisfied with the net income from the property over and above the taxes and insurance, and it is averred that they agreed to the propositions and paid the taxes and interest, but that the vendor declined to carry out the agreement and enforced the contract, though there had not been any considerable increase of income from the property or revival of trade and business in Chicago. This provisional arrangement is very loosely stated in the bill, but is, of course, admitted by the demurrer. It admits the revival of business to some extent before the enforcement of the contract. There is great difficulty, however, in determining the extent of increase contemplated by the arrangement from the statement in the bill. It was entered into in November 1859, and this suit was not instituted till August 1862, some two years and nine months afterwards.

But the true answer to this part of the case is, that the arrangement was not in writing, nor any consideration passing between the parties that could give validity to it. The promise by the purchasers was but in affirmation of what they were bound to perform by their written agreement, and all that was done was but in fulfilment of it.

We have thus gone carefully over the case as presented, and considered every ground set up on the part of the plaintiffs for the relief prayed for; but, with every disposition to temper the sternness of the law as applicable to them, we are compelled to say that, according to the settled principles both of law and equity, a case for relief has not been established.

The truth of the case is, that these plaintiffs improvidently entered into a purchase beyond their means, and, doubtless, relied very much upon the rise in the value of the estate and of the income, to meet the payments and expenditures laid out upon it. Their anticipations failed them, and a heavy debt was the consequence, beyond their ability to meet. Of the $93,000 purchase-money, they have paid only $10,000. Of interest, some $28,000. They expended for improvements $18,000. There still remained due against them $83,000 purchase-money and over $20,000 interest, at the time the vendor went into possession. The plaintiffs themselves had been in the possession and enjoyment of the premises for a period exceeding that for which the interest on the purchase money had been paid, which, at least, must be regarded as an equivalent for the money thus paid.

Decree of the court below affirmed.

In *Ketchum* v. *Evertson*, 13 Johns. 359, after stating, in language adopted by the court in the principal case, the general principle, that a vendee having paid part of the purchase-money and then refusing to complete his bargain shall not be allowed to recover back what he has paid, SPENCER, J., continues: "It would be an alarming doctrine to hold that the plaintiffs might violate the contract, and because they chose to do so make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have."

This rule appears to have been uniformly administered in New York: *Dowdle* v. *Camp*, 12 Johns. 451; *Ellis* v. *Hoskins*, 14 Id. 363; *Green* v. *Green*, 9 Cowen 46; *Haynes* v. *Hart*, 42 Barb. 58. In *Utter* v. *Stuart*, 30 Barb. 20, however, where a vendor, under a right reserved in the contract, declared it void, and took possession of the land, it was held that the vendee might recover the money paid, although the circumstances were such that, had the vendor chosen,

he could have enforced a forfeiture for failure of vendee to comply with the contract. The court does not deny the principle above stated; but, on the contrary, expressly affirms it, and the decision is placed on the ground that the vendor had several remedies, and that, having elected one of them, he must be held strictly to the rules governing that one. "Had the defendant (the vendor) seen fit to exercise the right of forfeiture, or had he placed his defence on that ground, and relied upon the sale and conveyance as evidence of that fact, it is certain that the plaintiff could not have maintained this action. But the defendant, both in his answer and in his proof, places himself upon the right reserved in the contract; and that was a right to declare the contract void in a certain contingency, which contingency having happened, the defendant availed himself of it."

The general rule governing the rescission of contracts, that the party rescinding must put the other in *statu quo*, was held therefore to apply. It is difficult, however, to reconcile this case with *Haynes* v. *Hart*, 42 Barb. 58, or indeed with the previous cases cited. In the latter case, it is said by JOHNSON, J., that "the party fails to get the property bargained for, because he neglected and refused to pay the purchase-price, and the owner takes it as he would have had the right to do without any such provision in the agreement. But the plaintiff expressly agreed he might take it in case of a default, and there the contract ends. *There is no promise for paying back, and there can be no recovery without*, in such a case."

It may, therefore, be doubted whether the law was correctly applied in the case of *Utter* v. *Stuart*.

In *Rounds* v. *Baxter*, 4 Greenl. 454, it was held by the Supreme Court of Maine that where the vendor resumed possession of the land, the vendee being in default, could not recover the payments already made. And in *Morton* v. *Chandler*, 6 Greenl. 142, A. being indebted to B., gave him a recognisance on which execution was issued, and A.'s land taken by extent to satisfy. A., in order to redeem the land, paid part of the debt, but failed to pay the whole, so that his right to redeem was lost. He afterwards brought an action in *assumpsit* to recover the money thus fruitlessly paid, and his counsel endeavored to distinguish the case from *Rounds* v. *Baxter*, on the ground that the rights of the parties here were determined by statute, and not by their own contract; but the court held that it was a voluntary payment, and could not be recovered. So also *Smith* v. *Haynes*, 9 Greenl. 128.

Similar decisions have also been made in other states: *Seymour* v. *Bennett*, 14 Mass. 266; *Cartwright* v. *Gardner*, 5 Cush. 273; *Leonard* v. *Morgan*, 6 Gray 412; *Page* v. *Cole*, 6 Clarke 153; *Walters* v. *Miller*, 10 Iowa 427; *Donaldson* v. *Waters*, 30 Ala. 175.

In Indiana, however, a different rule would seem to prevail. In *Gilbreth* v. *Grewell*, 13 Ind. 484, a contract of sale of land provided that if default were made by the purchaser in fulfilling any part of the contract, the seller might regard the contract as forfeited, and resell the land.

The court held that if the seller enforced the forfeiture he must account to the purchaser for payments made, with a right, however, to deduct damages accruing to him from the purchaser's breach of the agreement.

J. T. M.